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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

10 March, 2000

Mr. Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 96-98

Dear Mr. Strickling:

In its November 24, 1999 Supplemental Order, In re Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, the Commission concluded that a requesting carrier may use combinations of unbundled loops and transport network elements (sometimes referred to as extended links or EELs) if those combinations are used "to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer." (at paragraph 2. In addition, the Commission sought "comment on whether there is any basis in the statute or our rules under which incumbent LECs could decline to provide combinations of loops and transport network elements as unbundled network element prices." (at paragraph 6)

On February 28, 2000, the five largest incumbent local exchange carriers (the four Bell Operating Companies and GTE) and four small competitive local exchange carriers (Focal Communications, Intermedia Communications, Time Warner Telecom, and WinStar Communications) submitted to the Commission a specific proposal ("February 28 proposal") ostensibly to "clarify" the Supplemental Order. In fact, the February 28 proposal does not attempt to clarify that Order, nor to identify what constitutes a "significant amount of local exchange service," nor to provide any basis in the statute or rules under which incumbent local exchange carriers ("ILECs") could decline to provide EELs as unbundled network elements ("UNEs"). Rather, without providing any legal or public policy basis, it proposes far greater restrictions on requesting carriers' access to EELs than were contemplated by the Supplemental Order. If adopted, the proposed "clarification" would severely restrict the ability of requesting carriers to use EELs for any purpose, including the provision of local exchange services. Although the proposal would harm all requesting carriers, its impact would be greatest on large requesting carriers who would be artificially denied the ability to take advantage of economies of scale and automation.

In reviewing the February 28 proposal, the Commission must question the fundamental components of the proposal:

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(1) Why does the proposal incorporate requirements for collocation and prohibitions on commingling traffic that would severely undermine the usefulness of EELs, yet have nothing to do with identifying what constitutes a significant amount of local exchange service? These are conditions that, if implemented, would deny requesting carriers the very economies envisioned by Congress when it enacted the statutory requirement for ILECs to make UNEs available.

(2) Why does the proposal replace the self-certification process adopted by the Commission with a scheme that would permit ILECs to impose prior certification requirements on requesting carriers that would deny the carriers access to EELs at any price? The issue of whether interexchange carriers can convert special access services to combinations of unbundled loops and transport network elements is a pricing issue, not an access issue.

There is no basis in law or public policy for the use restrictions in the February 28 proposal, which are inconsistent with the statutory mandate for nondiscriminatory access to unbundled network elements. If the Commission is determined to condition access to EELs on the provision of local exchange service, it should permit self-certification by the competitive local exchange carrier ("CLEC"). Then, if an ILEC has reason to believe that a CLEC is not actually providing local service, the ILEC can make use of Section 208 complaint proceedings.

The February 28 proposal would grant requesting carriers access to EELs only where they met the terms of one of three "options." In each case, these terms would raise an insuperable barrier to the efficient use of EELs. In no case do the terms of these options apply to the ILECs when they provide local exchange and exchange access services. An examination of the options demonstrates their impracticality, as well as the extent of the discrimination they would effect.

All three options prohibit the connection of EELs to ILEC services. This proposed ban on "commingling" forces CLECs to deploy redundant facilities and then to operate them at lower usage levels, thus artificially denying them the same benefits of scale and scope economies that the ILECs enjoy. Specifically, the prohibition would prevent CLECs from multiplexing EELs on to spare channels on existing access facilities. Thus, for example, a CLEC that already has purchased a DS3 out of the ILEC's access tariff would not be permitted to assign a DS1 EEL to spare channel facilities on that DS3. Instead, the CLEC would be forced either to purchase a new unbundled DS3, or to take the EEL as a DS1 for the entire length of the circuit. Both of these choices are inconsistent with sound network engineering and economic efficiency.

Further, this proposed ban on commingling has nothing at all to do with the Commission's temporary restriction on the use of EELs in lieu of access services. Physical commingling can take place with the rates "ratcheted" to take into account the portion of the facility to be charged at access rate levels and the portion to be charged at UNE rate levels. The proposed ban on commingling is a blatant attempt by the ILECs to hobble competitive service providers.

Options 1 and 2, but not Option 3, require that EELs terminate at the requesting carrier's collocation facility. There is no statutory or regulatory basis for such a condition, which serves no purpose other than to drive up competitors' costs. If adopted, it would perversely encourage the construction of needless collocation facilities, thereby wasting central office space that might otherwise be available to carriers that truly require collocation, for example xDSL providers. It also would waste interoffice transport facilities because CLECs would order circuits to terminate at a central office where they have collocation facilities, even when that office is distant from the end user's serving wire center. Again, an inefficient network configuration would be forced on CLECs simply to raise their costs of doing business.

Option 1 would prohibit a CLEC from using EELs except for customers for which the CLEC is the "exclusive provider" of local exchange services. This is blatantly discriminatory and serves no public policy purpose. Since ILECs would not be subject to this prohibition, ILEC sales and customer service personnel would never be concerned about whether the ILEC is the exclusive provider of a customer's local services. They would go about their duties just as they do today, with no obligation ever to inquire into a customer's relationship with other carriers. CLEC sales and customer service personnel, however, would be required to interrogate each prospective customer to determine whether or not the customer also obtains local service from other providers. Competitive bids would have to include alternative prices depending on whether the customer enters a sole source arrangement with the CLEC. The results of these investigations would then have to be integrated into the CLEC's provisioning OSS to ensure that a circuit is ordered appropriately. Finally, customers would have to be monitored on an ongoing basis to ensure that the exclusivity requirement is met. In practice, a national CLEC with automated systems would never do any of these things. Instead, the CLEC would simply eschew the use of EELs.

Option 2 would further complicate the process by which CLECs determine whether or not a particular customer is eligible to be served by an EEL. It would be impossible for CLECs to devise sales scripts and provisioning procedures that incorporate these criteria. First, the CLEC would have to ascertain whether or not it would provide at least one third of the end user's local traffic measured as a percent of total end user customer lines. Then, if the customer orders at least a DS1, the CLEC would have to determine if at least 50 percent of the activated channels on the loop would have at least 5 percent local voice traffic individually, and if the entire loop facility would have at least 10 percent local voice traffic. Finally, if the circuit is to be multiplexed onto DS3 transport, the CLEC must ensure that every DS1 facility meets these criteria. Once again, only CLECs and not ILECs would have to meet these requirements in order to offer service to a customer. And once again, only CLECs and not ILECs would be forced to surrender network efficiencies to comply with a regulatory burden that has no statutory basis. Most CLECs would not ask the questions necessary to use Option 2, and no customer would answer the questions if asked. In the end, CLECs would simply not use EELs.

Option 3, which would govern conversion of access circuits to EELs, would require that at least 50 percent of activated channels be used to provide originating and terminating local dial tone service, and that at least 50 percent of the traffic on each local dial tone channel be local voice traffic (based on the ILEC's exchange area). Moreover, at least 33 percent of the loop facility would have to be local voice traffic. As with Option 2, where multiplexing is used each facility to be multiplexed must meet these criteria. These requirements – which are imposed on CLECs but not on ILECs – are discriminatory because the ILECs are able to sell to any customer regardless of the customer's calling patterns, but the CLECs would not be. Further, many customers could never predict with any level of accuracy what percentage of their calls will be local. If the intended result is to deter CLECs from utilizing EELs, then this is a fine way to do so. It would not be feasible for a large CLEC to undertake a circuit-by-circuit traffic study and monitoring program.

Moreover, even if the CLEC determines that one of the three options applies and finds a customer willing to let a CLEC quiz it about its business relationships with the CLEC's competitors, and if the ILEC agrees with the CLEC's determination, under the February 28 proposal the ILEC will retain auditing rights to ensure continued compliance with these barriers to competition. Thus, EELs will carry additional costs to CLECs, including the administrative cost of preserving the data needed to permit an audit. In addition, no CLEC can be comfortable with its largest competitor reviewing detailed records of its customers' services and usage. The audit rights alone would be sufficient to convince most CLECs that EELs are not worth the trouble.

If the Commission chooses to set in rules all the percentage and exclusive provider requirements in the February 28 proposal, how would it implement those rules on a month by month basis as customers' calling patterns change and as they no longer purchase a service exclusively from the CLEC? Customers will be unwilling to provide the tracking information necessary to monitor their calling patterns and choice of carriers. Even if such monitoring were possible, how would the ILECs switch back and forth between charging UNE rates and charging access rates? Are the ILECs committed and able to manage these changes? What are the ILECs' plans for issuing credits when a circuit "turns UNE"? If the CLEC were obtaining access to EELs as the exclusive service provider to a customer, could the ILEC discontinue to provide those EELs simply by successfully gaining a small portion of that customer's business?

The February 28 proposal is effectively a proposal proscribing loop/transport combinations for <u>all</u> purposes, and should be rejected outright. While we think it plain that use restrictions are unlawful, if the Commission nevertheless is committed to such unlawful regulation, it should at least limit the harm to its intended target of access uses.

The varying business plans and models of CLECs, as well as the diverse and ever-changing needs of individual customers, render any quantitative measure of "significant local use" meaningless.[1] But self-certification could be based on visible actions taken by

[1] Consider even a simple "10 percent of traffic" rule, analogous to the one used to determine whether a special access line should be treated as interstate or intrastate. Should the 10 percent relate to total

the CLEC. The essential factor -- and the appropriate standard -- is whether the CLEC's customer can receive local calls from or place local calls to all other telephone users (whether customers of the CLEC, of other CLECs, or of the ILEC) within the exchange area the CLEC has defined in its local tariff. If the CLEC assigns to a customer a local number or block of numbers that can either be reached by anyone, or can be used to reach anyone, then the unbundled loop and transport that supports that local phone number(s) is significantly there for the provision of local service. Said another way, when a CLEC has expended resources to deploy or obtain switching and to implement interconnection, and has established for the customer a local number or block of numbers that can be used to call others or that others can call (which provides the customer with an "address" within the North American Numbering Plan that is recognized by other carriers and relates to a given local switch), those steps should be viewed as prima facie evidence that the CLEC's intent is to provide a significant amount of local exchange service.

It therefore makes sense to apply a "significant local use" restriction on EELs by requiring CLECs to self-certify, and then allow ILECs to use the Section 208 complaint process if they believe that the CLEC certification is fraudulent. In an adjudicatory proceeding, the Commission could examine all the facts and circumstances before making a determination of significance.

Complaint proceedings are particularly appropriate here since only money damages will be at issue. If the CLEC is found not to have complied with the "significant local use" restriction, then the remedy is simply to require the CLEC to pay the revenues generated by the difference between the EEL price and the tariffed access price.

Restrictions on the use of unbundled network elements are bad public policy as well as unlawful. Access to EELs fosters facilities-based competition. CLEC use of EELs is coupled with multimillion dollar CLEC switch deployment. If EELs are not available to give CLECs the same access to customers that ILECs enjoy, CLECs are far less likely to sink further capital, causing networks to be built out less. Access to EELs allows CLECs to grow their customer base, fostering further network build out over time, from the switch to their customers' end offices and eventually to the customers' premises.

If the Commission is determined to allow such restrictions, if only on an interim basis, it should make the restrictions as self-effectuating as possible. It should in no case allow an ILEC to refuse a request for an EEL based on the ILEC's opinion of what the

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customer traffic as Bell Atlantic has proposed or should it relate to the traffic that is carried over the lines that the CLEC provides to the customer? MCI WorldCom believes the latter would be the better approach, but even that is fraught with problems. Two scenarios show why neither approach is good. Consider a customer who currently obtains 20 T1 connections from its ILEC to carry local traffic. The customer then decides to get one of its T1s from a CLEC in order to evaluate alternative providers. But since the CLEC only carries 5 percent of the customer's total local traffic, it cannot obtain the connection at UNE prices, even though that line is carrying 100 percent local traffic. Alternatively, a CLEC could be providing 100 percent of a customer's local calling and still have more than 90 percent of the usage on its connection to that customer be long distance if that customer happens to generate a lot of long distance but very little local traffic. Moreover, technological changes are rendering quantitative measures meaningless. A product such as Sprint's ION, which assigns bandwidth depending on demand for particular applications at particular times, would not fit within any percentage-based requirement.

circuit will be used for. It should instead require the ILEC to provision the circuit and then proceed with a formal complaint.

We look forward to meeting with you to discuss this issue at greater length.

Sincerely,

Chuck Goldfarb

Chuck Goldfarb
Director
Law and Public Policy

cc. Chairman Kennard
Commissioner Ness
Commissioner Tristani
Commissioner Powell
Commissioner Furchtgott-Roth
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